Malaysian Bunkers System Sdn Bhd v Zainal Fikri bin Hj Ahmad & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO 29–1837 OF 2002
LOW HOP BING, MOHD GHAZALI AND ZULKEFLI JJCA
19 DECEMBER 2007

Civil Procedure — Preliminary objection — Whether court should rule on preliminary issues — Appeal — Leave of Court of Appeal — Whether appeal only related to issue of costs — Whether leave of Court of Appeal required — Court of Judicature Act 1964 s 68(1)(c)

The respondents (legal firm) were appointed by the appellant to take over conduct of two civil matters from its former solicitors sometime in November 1997. The appellant alleged that the respondents agreed to take over conduct of the two matters at an agreed fee of RM10,000. However, the respondents denied having such an agreement. Upon completion of the matters, the respondents filed a petition to tax the costs on a solicitor-client basis pursuant to s 126(1) of the legal Profession Act 1976. The High Court allowed the petition and ordered the respondents' bills of costs to be referred to the deputy registrar for taxation. The appellant appealed against the order. The respondents raised a preliminary objection on the ground that the decision of the High Court relates to the issue of costs only and therefore, leave of the Court of Appeal was required under s 68(1)(c) of the Courts of Judicature Act 1964.

Held, dismissing the preliminary objection:

(1) As a general rule, no appeal shall be brought to the Court of Appeal where the judgment or order relates to costs only, which by law are left to the discretion of the court, except with the leave of the Court of Appeal (see para 24(1)).

(2) In determining whether an appeal comes within s 68(1)(c), the Court of Appeal must look at the true character of the matter under appeal and must reject any smoke screen to hide the true character of the appeal (see para 24(3)).

(3) The appeal herein against the two orders involves questions of law and principle, or alternatively the issue of costs constitutes part and parcel

of the larger appeal pertaining to these two orders. The appeal in any event concerns a genuine complaint, not only about costs but also about other matters such as the charging order. Hence, the court has full jurisdiction to deal with both the costs and the other matter pertaining to charging order. No leave of court is required (see paras 25–26).

[Bahasa Malaysia summary

Responden-responden (firma guaman) telah dilantik oleh perayu untuk mengambil alih pengendalian dua perkara sivil daripada bekas peguamcaranya sekitar bulan November 1997. Perayu mendakwa bahawa responden-responden telah bersetuju untuk mengendalikan dua perkara tersebut pada kadar yuran yang dipersetujui sejumlah RM10,000. Namun, responden-responden menafikan telah membuat persetujuan sedemikian. Setelah selesai perkara-perkara tersebut, responden-responden telah memfailkan satu petisyen untuk mengenakan cukai ke atas kos berdasarkan hubungan peguam-anakguam menurut s 126(1) Akta Profesyen Undang-Undang 1976. Mahkamah Tinggi telah membenarkan petisyen tersebut dan memerintahkan bil-bil kos responden-responden dirujukkan kepada timbalan pendaftar untuk pencukaian. Perayu telah merayu terhadap perintah tersebut. Responden-responden telah menimbulkan satu bantahan awal atas alasan bahawa keputusan Mahkamah Tinggi adalah berkaitan dengan isu kos sahaja dan oleh itu, kebenaran Mahkamah Tinggi diperlukan di bawah s 68(1)(c) Akta Mahkamah Kehakiman 1964.

Diputuskan, menolak bantahan awal:

(1) Menurut rukun am, tiada rayuan patut dibawa ke Mahkamah Rayuan di mana penghakiman atau perintah adalah berkaitan kos sahaja, yang mana dari segi undang-undang terletak kepada budi bicara mahkamah, kecuali dengan kebenaran Mahkamah Rayuan (lihat perenggan 24(1)).

(2) Dalam menentukan sama ada suatu rayuan itu terjatuh di bawah s 68(1)(c), Mahkamah Rayuan hendaklah melihat sifat sebenar perkara yang dirayukan itu dan hendaklah menolak apa-apa yang mengaburi sifat sebenar rayuan tersebut (lihat perenggan 24(3)).

(3) Rayuan di sini adalah terhadap dua perintah yang melibatkan persoalan undang-undang dan prinsip, atau secara alternatifnya isu kos yang membentuk sebahagian daripada rayuan secara keseluruhannya berkaitan kedua-dua perintah tersebut. Rayuan itu dalam apa halpun adalah berkaitan satu aduan yang tulen, bukan sahaja mengenai kos tetapi juga mengenai perkara-perkara lain seperti perintah mengenakan caj. Oleh itu, mahkamah mempunyai bidang kuasa sepenuhnya untuk

mengendalikan kedua-dua perkara mengenai kos dan perkara lain berkaitan perintah mengenakan caj itu. Tiada kebenaran mahkamah diperlukan (lihat perenggan 25–26).]

Notes

For cases on whether court should rule on preliminary issues, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5853–5857.

Cases referred to

Anthony Lucas v The Malayan Cultures Co, Ltd [1933] MLJ 21 (refd)
Crystall v Crystall [1963] 2 All ER 330 (refd)
Rio Grande etc, In Re The (1877) 5 CD (refd)
Wheeler v Somerfield & Ors [1966] 2 All ER 305 (refd)
Vijayalakshmi Devi a/p Nadchatiram v Mahadevi a/p Nadchatiram [2006] 6 MLJ 438 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 68(1)(c)
Johore Courts Enactment No 17 of 1920 s 17(c)
Legal Profession Act 1976 s 126(1)
Supreme Court of Judicature (Consolidation) Act 1925 [UK] s 31(1)(h)

Appeal from: Petition No 26–8 of 2005 (High Court, Johor Bahru)

Sivarasa Rasiah (Daim & Gamany) for the appellants.
Badrol Hisham bin Mohd Sami (Zainol & Badrol) for the respondents.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] On 11 November 2005, the learned judicial commissioner of the Johor Bahru High Court ('the High Court') allowed the petition in encl (2) filed under s 126(1) of the Legal Profession Act 1976 by the petitioners, practising as advocates and solicitors ('the solicitors').

[2] The High Court ordered the solicitors' bills of costs 114/2005 to 120/2005, all dated 20 April 2005, to be referred to the deputy registrar for taxation on a solicitor-client basis ('taxation order'). The High Court also made a charging order on the taxed costs ('charging order'). (The taxation order and the charging order shall collectively be referred to as 'the two orders'.)

[3] This is the appeal by the appellant, Malaysian Bunkers System Sdn Bhd ('the client') against the two orders.

[4] In this judgment, the words 'solicitor' and 'solicitors' are used interchangeably; and a reference to a section is a reference to that section in the Legal Profession Act 1976 unless otherwise stated.

FACTUAL BACKGROUND

[5] In 1993, the client appointed Messrs Abdul Razak Ahmad & Associates ('the former solicitors') to handle two civil matters against Destination Marine Services Sdn Bhd ('Marine Services') to recover monies due to the client. The two civil matters are:

1 Johor Bahru High Court Civil Suit No 22–68–93 to recover a sum of RM491,652.81 ('the High Court suit'); and

2 Johor Bahru High Court Civil Suit No 22–67–93 to recover a sum of RM13,212.32. This matter was subsequently transferred to the Johor Bahru Sessions Court ('the sessions court suit').

[6] The client alleged that:

1 Sometime in November 1997, the solicitors through solicitor Badrol Hisham bin Mohd Sani agreed to take over the two civil matters from the former solicitors at a fee of RM10,000. This agreement was said to have been documented by the client's company resolution No 33/97 dated 10 November 1997 ('the resolution') stating that the said fee was for all work, to be paid upon a positive and final outcome; and

2 The solicitor had acknowledged receipt of a copy of this resolution, the cause papers and other documents when the client's 'director', one Encik Johari bin Abdullah, personally handed them to the solicitor at his office on 18 November 1997.

[7] The solicitor however denied having received a copy of the resolution, which he alleged was subsequently added to the acknowledgment of receipt of the cause papers and other documents.

[8] The sessions court suit was dismissed with costs on 11 June 2002. On behalf of the client, the solicitor filed an appeal against that decision to the Johor Bahru High Court vide MT4–12–109–02. However, a settlement was reached between the parties and the appeal was later withdrawn by the client.

[9] In 1999, the High Court suit was dismissed with costs on 29 October 2001. On behalf of the client, the solicitor appealed to the Court of Appeal vide Civil Appeal No J–02–1052–01 on 21 November 2001. The Court of Appeal allowed the appeal on 28 April 2004 and Marine Services was ordered to pay to the client RM514,673.61 with interest and costs.

[10] Marine Services then filed an application for leave to appeal against the Court of Appeal decision on 28 April 2004 to the Federal Court vide Civil Application No 08–59–2004(J). However, the client and Marine Services then resolved the matter amicably and consent judgment was recorded in the Federal Court on 17 January 2005 in the presence of the solicitor, whereby Marine Services consented to pay the client RM800,000 by way of 13 postdated cheques.

[11] The client alleged that the solicitor did not at any time, since taking over conduct of the two civil matters in all the courts, request orally nor in writing for any further payment of fees.

[12] The client alleged that when the client paid the RM10,000 to the solicitor on 29 September 2004, the solicitor did not request for any further fee, except that the cheque for the RM10,000 be paid in his name instead of the firm of solicitors. He acknowledged receipt of the cheque.

[13] Eight months later, on 28 June 2005, the client received the solicitors' petition to tax the costs on a solicitor-client basis.

[14] The solicitor claims that he had delivered the bills of costs by post while the client alleged having seen the bills of costs for the first time only on 28 June 2005, when the bills were attached to the petition served on the client.

PRELIMINARY OBJECTION

[15] Mr Badrol Hisham bin Mohd Sani, learned counsel for the solicitors, raised a preliminary objection on the ground that the decision of the High Court relates to the issue of costs only and so under s 68(1)(c) of the Courts of Judicature Act 1964, leave of the Court of Appeal is required. In the absence of such leave, this appeal is fundamentally defective and incompetent, relying on *Vijayalakshmi Devi a/p Nadchatiram v Mahadevi a/p Nadchatiram* [2006] 6 MLJ 438.

[16] Mr Sivarasa Rasiah, the client's learned counsel, responded that no leave is required.

[17] The above preliminary objection raises the question of whether the two orders come within the ambit of s 68(1)(c) which, where relevant, reads:

> 68 Non-appealable matters. (1) No appeal shall be brought to the Court of Appeal in (c) where the judgment or order relates to costs only, which by law are left to the discretion of the Court, except with the leave of the Court of Appeal

[18] Section 68(1)(c) and other equipollent provisions have been judicially considered in a number of instances.

[19] In *Anthony Lucas v The Malayan Cultures Co, Ltd* [1933] MLJ 21, the plaintiff, a pauper, successfully sued the defendant company for $1,251.08, with costs to be taxed on the Supreme Court scale. The taxed costs amounted to $2,129.08, inclusive of 'profit costs'. On a review of taxed costs, the High Court held that 'profit costs' could not be recovered in a 'pauper action.' On appeal, a preliminary objection was taken that it being concerned with the question of costs, the appeal was not competent under s 17(c) of the then Johore Courts Enactment No 17 of 1920. Murison CJ presiding in the then Court of Appeal considered s 17(c) and dismissed the preliminary objection, as the appeal involved a question of law and principle, in which case an appeal does lie: see also *In Re The Rio Grande etc* (1877) 5 CD at p 284 per James LJ.

[20] Section 31(1)(h) of the English Supreme Court of Judicature (Consolidation) Act 1925 was an equipollent provision of s 68(1)(c) which, where relevant, read:

> No appeal shall lie…. (h) without the leave of the court or judge making the order, from an order of the High Court or any judge thereof made … as to costs only which by law are left to the discretion of the court.

[21] Section 31(1)(h) was examined by the Court of Appeal in *Crystall v Crystall* [1963] 2 All ER 330. Willmer LJ held that the husband's appeal, in so far as it related to costs, was only part of the larger appeal against the order which allowed the wife's claim for the proceeds from the sale of the matrimonial home, and so the appeal was competent. It was not an appeal relating to costs only.

[22] Section 31(1)(h) was also discussed by the Court of Appeal in *Wheeler v Somerfield & Ors* [1966] 2 All ER 305. Lord Denning MR explained that under this section, if a person made no complaint against the judgment below, except about the order for costs, then he must obtain leave of the trial judge before he could come to the Court of Appeal. If he made a genuine complaint, however, not only about the costs, but also about other matters,

then he can appeal both on those other matters and also on the costs; and the court has full jurisdiction to deal with them. Even if he failed on the other matters, the Court of Appeal has jurisdiction to deal with the costs.

[23] In *Vijayalakshmi Devi a/p Nadchatiram v Mahadevi a/p Nadchatiram* [2006] 6 MLJ 438, our Court of Appeal discovered that the essence of the appellant's application in encl (256) was for the revocation of the registrar's order made solely on the issue of costs. That was the true character of the matter under appeal. The appellant's attempt to convince the Court of Appeal that the order of costs involved law and principle and that it was part of a larger appeal were all rejected as a smoke screen to hide the true character of the appeal. The preliminary objection based on the incompetency of the appeal pursuant to s 68(1)(c) was sustained by the Court of Appeal, speaking through James Foong JCA, and the appeal was dismissed.

[24] For purposes of completeness, pursuant to s 68(1)(c) or equipollent provisions, the principles enunciated in the above authorities may be stated as follows:

1 As a general rule, no appeal shall be brought to the Court of Appeal where the judgment or order relates to costs only, which by law are left to the discretion of the court, except with the leave of the Court of Appeal.

2 By way of exceptions, s 68(1)(c) would admit an appeal:

(a) where the appeal involves a question of law and principle;

(b) where the appeal in relation to costs is only part of a larger appeal against the order which allows the claim ie where the appeal was not in relation to costs only; or

(c) where the appeal concerns a genuine complaint, not only about costs, but also about other matters, in which case the court has full jurisdiction to deal with both the costs and other matters, and even if the appeal fails on other matters, the Court of Appeal has jurisdiction to deal with costs

3 In determining whether an appeal comes within s 68(1)(c), the Court of Appeal must look at the true character of the matter under appeal and must reject any smoke screen to hide the true character of the appeal

[25] Reverting to the preliminary objection, I am of the view that the appeal herein against the two orders involves questions of law and principle, or alternatively the issue of costs constitutes part and parcel of the larger appeal pertaining to these two orders. The client's appeal in any event

concerns a genuine complaint, not only about costs but also about other matters such as the charging order. Hence, this court has full jurisdiction to deal with both the costs and the other matter pertaining to charging order.

CONCLUSION

[26] In the circumstances, I am unable to find any substance in the solicitor's preliminary objection based on s 68(1)(c) and hold that no leave of this court is required. This appeal should be heard and determined on merits. Costs in the cause.

[27] My learned brothers, Mohd Ghazali bin Mohd Yusoff JCA and Zulkefli bin Ahmad Makinudin JCA (now FCJ) have read this judgment in draft and have expressed their agreement with it as the judgment of the court.

Preliminary objection dismissed.

Reported by Brendan Navin Siva